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IN THE

Supreme Court of the United States

October Term, 1956

No. 350

JOSEPH M. CAIN, *Petitioner*

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph M. Cain, respectfully presents this petition for review on writ of certiorari of the decision and judgment of the United States Court of Claims rendered June 5, 1956 in the Case of *Joseph M. Cain* v. *United States of America*, No. 50418. The opinion of the Court of Claims is reported at 135 Fed. Supp. 516 and is included herein as Appendix A, pp. 1a to 18a.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. 1255.

STATUTES

The pertinent provisions of the Internal Revenue Code of 1939 material to the questions herein presented are set forth herein as Appendix B, pp. 18a and 19a.

QUESTIONS PRESENTED

Your petitioner respectfully represents that the decision of the Court of Claims raises the following questions:

1. Is the petitioner, a co-partner of his son, Dr. Charles C. Cain, in the practice of dentistry under a written partnership agreement entered into in the fall of 1942, effective on the first day of January, 1943, taxable on any portion of his son's share of partnership income for the calendar year of 1944 since the son was serving in the Armed Forces of the United States from December 5, 1942 until October 30, 1944 when the son returned to the practice of dentistry under said partnership agreement?

2. Is it permissible for the Commissioner of Internal Revenue, under the provisions of the Internal Revenue Code of 1939, to divide a tax year and refuse to recognize a professional partnership for the early part of said year but recognize it for a later portion in spite of the fact that the written partnership agreement was entered into prior to the year 1943, became effective on January 1, 1943 and all services rendered to the partnership in the year 1944 by the absent member were rendered under said 1942 agreement?

SUMMARY STATEMENT

The following statement is based upon the Findings of Fact made by the Court of Claims, appearing as part of Appendix A, pp. 1a to 18a. The petitioner, Dr. Joseph M. Cain, had been engaged in the practice of dentistry in the City of Canton, Ohio for many years as a partner of his father, Dr. Henry O. Cain, such partnership having been formed when petitioner graduated from college (Finding #1, p. 9a). The petitioner promised his son, Charles C. Cain, a full partnership upon the son's graduation in order to induce his son to enter dental school (Finding #2, p. 10a). Dr. Charles C. Cain was graduated from dental college in June, 1942, admitted to practice in the State of Ohio on August 5, 1942 and entered into a written partnership agreement with his father, the petitioner, in the fall of 1942, to become effective January 1, 1943 (Findings #3, 5, pp. 10a and 11a). By agreement between the petitioner and his son, the son worked as a salaried employee for his father from August until inducted into service in December, 1942 (Finding #4, p. 10a).

While in dental college, the son received a Navy commission as a probationary ensign and was commissioned a lieutenant (j.g.) in the Navy on October 30, 1942. He was called into service and left Canton, Ohio for active duty on December 5, 1942 (Finding #3, p. 10a). The son was in active service and away from Canton with the exception of two or three leaves of short duration, until October 30, 1944, but did perform services for the partnership on the occasions of his leaves during the period between December 5, 1942 and October 30, 1944 (Finding #7, p. 13a).

Partnership returns were filed by the partnership for the years 1943 and 1944 and Dr. Charles C. Cain

reported his share of partnership income for each of said years upon his own individual income tax returns and paid the taxes due thereon. Petitioner reported on his income tax returns for said years only his share of the partnership income and paid the taxes due thereon (Findings #9, 10, pp. 13a and 14a).

Upon examination of petitioner's returns for said years by the Commissioner of Internal Revenue the entire partnership income was held to be taxable to the petitioner on the basis that no bona fide partnership recognizable for income tax purposes, existed between petitioner and his son in the years 1943 and 1944 (Finding #11, p. 14a).

Deficiencies were thereupon assessed against the petitioner in the amounts of $25,303.20 for 1943 and $33,696.14 for 1944. Petitioner paid such deficiencies with the accrued interest, filed claims for refund and when said claims were either rejected or not acted upon, filed his action in the Court of Claims for recovery of the amounts of deficiencies and interest so paid by him (Findings #13, 14, 17, 18, pp. 15a and 16a).

By the decision of the Court of Claims, petitioner was held to be taxable for all partnership income for the year 1943 and for that part of the partnership income which had been earned prior to October 30, 1944 when his son, Dr. Charles C. Cain returned from military service. The Court of Claims held that on and after October 30, 1944, the partnership income should be taxed equally to petitioner and Dr. Charles C. Cain. By its order entered June 5, 1956, held petitioner was entitled to a refund of $2555.74 representing the tax and interest illegally collected from the petitioner on his son's share of income from the part-

nership from and after October 30, 1944. (Transcript p. 41).

The partnership, the petitioner and his son all filed their income tax returns and kept their books of account on a calendar year basis (Findings #8, 9, 10, pp. 13a and 14a).

PETITIONER'S CONTENTION

It is the contention of the petitioner, Joseph M. Cain, that the absence of a partner while serving in the Armed Forces of the United States is not a proper basis for splitting the tax year of the partnership so as to hold one partner wholly taxable for the partnership income during a part of the year while recognizing the partnership for the remainder of such tax year.

Or, to state the contention in another way, if vital services are rendered to a partnership in such manner that the partnership is recognized for any part of a calendar year, then the absence of a partner because of military service in the Armed Forces of the United States, cannot be used as the basis for splitting the taxable income of such absent partner irrespective of whether such services were rendered at the beginning, during the middle, or near the end of such calendar year.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Claims is contrary to law, there being no statutory basis for dividing or splitting the calendar year for income tax purposes.

2. The decision below deprives petitioner of his constitutional right of equal protection of the law

under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The failure of petitioner's son, Dr. Charles C. Cain, to engage actively in the conduct of the partnership business during the year 1944 was caused by the same agency, to-wit: the respondent, which now seeks to penalize the petitioner because of the son's absence in military service.

4. The Findings of Fact made by the Court of Claims do not support that Court's conclusions of law and its judgment and such conclusions and judgment are in conflict with the principles laid down in *Commissioner* v. *Culbertson*, 337 U.S. 733.

ARGUMENT

There are many decided cases which have recognized that the enforced absence of a partner in the armed forces during World War II did not destroy the partnership relation nor cause such absentee partner's share of partnership income to be taxable to one or more of the remaining partners.

For example, in *Isaac Blumberg*, 11 T.C. 663 (Acq. 1949-1 C.B.-p.1) on facts almost identical to those of the present cause, it was held that the absence of a son in the armed forces from December, 1942 until November, 1945 did not affect the partnership relationship or the son's taxability on his share of partnership income for the year 1943. In that case the partnership agreement was signed in August, 1942 to become effective January 1, 1943. The son left for military service in December, 1942 and consequently never rendered any service to the partnership. As the reported facts show, he remained in this country only

4 or 5 months after induction and then went overseas where he remained until November, 1945. We quote the head note in the *Blamberg* case as follows:

> "Under the facts, held, that during the taxable year 1943 petitioner was, by virtue of a valid written partnership agreement entered into in August 1942, a partner with his son in the department store business in Portsmouth, Virginia, and three-fourths of the net profits of the business belonged to petitioner and were taxable to him and one-fourth of the net profits belonged to petitioner's son and was taxable to him. The Commissioner's action in adding the son's one-fourth of the net profits to petitioner's net income was error and is reversed."

On page 671 of the Opinion, Judge Black makes the following statement:

> "* * * Clearly, if George had remained on with the business in 1943 and had continued to render the same kind of services that he was rendering the business in 1942, he would have been recognized as a partner under the rationale of the Lusthaus and Tower cases. We do not understand the respondent to contend otherwise. His contention that George should not be recognized as a partner in 1943 is based on the fact that all of that year he was in the military service and did not and could not render any important and vital services to the business. That George ceased to be a partner on that account seems to us to be an untenable doctrine. Death, of course, terminates a partnership, but it would be a strange doctrine to say that one did not become a partner because he was inducted into the military service of his country and was thereby unable to personally serve the partnership. It seems to us that the Government should not be heard to say: 'I will not recognize you as a partner even though you, in good faith,

> entered into it. I took you into the Army to fight a war and you did not perform services for the partnership as you had agreed to do.' "

In *Crossley* v. *Campbell*, 184 Fed. (2d) 639, involving the year 1943, a father-son partnership agreement was executed in June, 1942 while the son was in college. He completed his college studies about March 15, 1943 and worked for the partnership until May, 1943 when he was called into the Navy and remained in Service until June, 1946.

The second paragraph of the syllabus of this case holds:

> "Evidence sustains finding that partnership entered into by father with his son to operate electronic laboratories was real, bona fide partnership which should be recognized as valid for federal income tax purposes during the year 1943, notwithstanding son worked for firm only approximately two weeks in 1942 and two months in 1943."

Thus it appears from the foregoing citations that the family partnership was recognized for the entire tax and calendar year under circumstances:

(a) Where no service at all was rendered as a partner prior to or during the tax year in question because of absence in military service; and

(b) Where services were rendered as a partner during two months between March and May, but the first months of the year had been spent in college and the remaining months of the year in military service.

The petitioner contends that to recognize partnerships under those circumstances, but to deny the recognition of the partnership between petitioner and his son for the first ten (10) months of the year 1944, is

neither supported by logic nor law, and if allowed to stand deprives petitioner of the equal protection of law required by Section 1 of the Fourteenth Amendment to the Constitution.

It has often been stated by the courts that the unit of time, for income tax purposes, is either the calendar or a fiscal year and that neither the taxpayer nor the Government can throw income of one year into a prior or subsequent year for tax purposes. See *Commissioner* v. *Frame*, 195 Fed. (2d) 166 and *Commissioner* v. *Dwyer*, 203 Fed. (2d) 522. While these cases, and many others to the same effect, involve changes of accounting or reporting bases by taxpayers, the principle is identical.

The present case is not one where a partnership was newly formed on October 30, 1954. It was formed in 1942, to become effective January 1, 1943. It had been formed pursuant to a commitment made by the petitioner to his son some years before in order to induce the son to enter dental college.

The pertinent provisions of the Internal Revenue Code of 1939, quoted in full in Appendix B, pp. 18a and 19a, refer only to "taxable year". The Code definition of taxable year so far as pertinent to the present issues, is as follows:

> " 'taxable year' means the calendar year, or the fiscal year ending during the calendar year, upon the basis of which the net income is computed under this Part * * *."

This lends no support to any division of the "taxable year" of a partnership or partnership income for any calendar or fiscal year.

What difference can or should it make on taxation of partnership income during the year 1944, that services to the partnership were rendered at the end of the year, instead of April and May (see *Crossley* v. *Campbell*, *supra*), or in the year 1942 (see *Isaac Blumberg*, *supra*)?

It is an established principle of law that one cannot take advantage of his own wrong nor can he make performance of an obligation impossible and then take advantage of such nonperformance. The rule is succinctly stated in 12 Am. Jur. 958, as follows:

> "If the impossibility of performance arises directly or even indirectly from the acts of the promissee, it is a sufficient excuse for nonperformance. This is upon the principle that he who prevents a thing may not avail himself of the nonperformance which he has occasioned."

This rule was applied against the Government in *United States* v. *Peck*, 102 U.S. 64, where part 2 of the syllabus reads:

> "The conduct of one party to a contract which prevents the other from performing his part is an excuse for nonperformance."

The principle was applied in the *Blumberg* case, *supra*, as is indicated by the quotation from Judge Black's opinion, p. 7, *supra*.

Finally, the petitioner contends that the Court of Claims' conclusions of law and judgment are not supported by that Court's Findings of Fact and in fact are in conflict with the determinative principles of partnership tax law set forth by this Honorable Court in *Commissioner* v. *Culbertson*, 337 U.S. 733.

The opinion in that case by the Chief Justice explains that the "original capital" or "vital services" tests were "an error in emphasis", and then proceeds to set forth the true test of a partnership recognizable for tax purposes as follows: (p. 742)

> "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—*the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.*" (Emphasis added.)

Again on page 744 it is said:

> "Unquestionably a court's determination that the services contributed by a partner are not 'vital' and that he has not participated in 'management and control of the business' or contributed 'original capital', has the effect of placing a heavy burden on the taxpayer to show the bona fide intent of the parties to join together as partners. But such a determination is not conclusive and that is the vice in the 'tests' adopted by the Tax Court. It assumes that there is no room for an honest difference of opinion as to whether the services or capital furnished by the alleged partner are of sufficient importance to justify his inclusion in the partnership. *If, upon a consideration of all the facts, it is found that the partners join together in good faith to conduct the business, having agreed that the services or capital to be contrib-*

> *uted presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient.* (Emphasis added.)

Justice Burton, in his concurring opinion, touches upon the war service question in the following language, p. 749:

> "The physical absence of some of the Culbertson boys from the ranch does not necessarily preclude them or others from the obligations or the benefits of the partnership for tax purposes. The contributions of capital, their participation in the income and their commitments to return to the ranch or otherwise to render service to the partnership are among the material factors to be considered. *A present commitment to render future services to a partnership is in itself a material consideration to be weighed with all other material considerations for the purposes of taxation as well as for other partnership purposes.*" (Emphasis added.)

It is significant in the present case that the Findings of Fact made by the Court below do not include a finding that the petitioner and his son did not act in good faith and with a business purpose to join together in the present conduct of the dental enterprise. It is submitted the mere fact of the son's absence in military service does not compel, or even support, a conclusion of bad faith or lack of business purpose. On the other hand, the Court below did find as facts—

(a) Partnership was promised years before it was formed;

(b) The son had worked in the dental laboratory during his college years when home on vacation;

(c) The partnership was entered into in 1942 to become effective January 1, 1943;

(d) The son's name was placed upon the office door;

(e) The son was authorized to sign checks on the partnership bank accounts;

(f) Partnership books were opened and maintained in the partnership name;

(g) Partnership returns were prepared and filed; and

(h) The son's shares of the partnership income was at his disposal and portions of it were used to pay his obligations.

Surely those Findings of Fact clearly demonstrate good faith and a business purpose to join together presently to engage in the practice of dentistry as partners.

CONCLUSION

For the foregoing reasons and upon the authorities cited, the petitioner submits that the judgment and order of the Court of Claims are in error in failing to recognize the partnership for tax purposes during the entire year 1944.

The petitioner therefore prays that this Honorable Court issue a Writ of Certiorari so that it can review the action of the United States Court of Claims.

Respectfully submitted,

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Certificate of Counsel

Albert B. Arbaugh hereby certifies that he is attorney of record for Joseph M. Cain, the petitioner in the foregoing petition for writ of certiorari, that he believes the petition to be well founded in law and in fact and that the petition is not interposed for purposes of delay.

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August 27, 1956